No. 997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL.,
Petitioners

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on February 23, 1961, affirming an order of the Federal Trade Commission entered against petitioners on February 24, 1959.

OPINION BELOW

The opinion of the Court of Appeals is reported at 287 F. 2d 512 and appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1961 and issued April 3, 1961. It appears in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Subsection 2(f) of the Robinson-Patman Amendment to the Clayton Act proscribes a *buyer's* knowing inducement or receipt of a *seller's* price discrimination which violates subsection 2(a). In a series of proceedings against sellers of automotive part and supplies, 1955 to 1959, the Federal Trade Commission and the Courts of Appeals held that prices charged petitioners and other buyers violated 2(a). The seller proceedings involved difficult and sharply litigated issues of liability. Questions as to whether the prices were within the sellers' cost justification or meeting competition defenses under the statute were not fully settled until completion of judicial review proceedings. In four cases, the Commission itself split, one Commissioner dissenting on grounds that no competitive injury cognizable under the statute had occurred.

The instant case is one of several brought under subsection 2(f) against buyers from these sellers. In the proceedings below, the Court of Appeals found that petitioners had knowledge of the illegality of these prices, six years before the Commission first ruled in the seller cases. Under criteria of this Court's controlling decision *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61 (1953), this finding, to stand, must be based upon an appropriate showing of record that petitioners *knew* that these prices were injurious to competitors, *knew* that they were not cost justified, and *knew* that they were not made to meet competition, or otherwise defensible under the statute.

The question presented is whether the Court of Appeals disregarded this Court's *Automatic Canteen* decision in finding that petitioners had knowledge that prices they received from their suppliers were unlawful.

Subsidiary questions are:

1) Whether the Court of Appeals erred in failing to consider petitioners' contention that they had no knowledge that the prices might cause injury to competitors;

2) Whether the Court of Appeals failed to make a fair assessment of the whole record in finding that petitioners knew that the prices were not cost justified;

3) Whether the Court of Appeals failed to make a fair assessment of the whole record in finding that petitioners knew that the prices were not within their sellers' meeting competition defense;

4) Whether the Court of Appeals erred in failing to consider petitioners' contention that they did not know the prices were not within the statute's cooperative exemption.

STATUTE INVOLVED

This proceeding is brought under subsection 2(f) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(f), which provides that

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

The question presented involves, as well, the prohibition against price discriminations contained in subsection 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), which provides in relevant part:

> That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

The question also involves certain justifications or exemptions from the price discrimination prohibition of the Act, including the cost justification proviso of subsection 2(a):

> Nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; . . .

the meeting competition proviso of subsection 2(b), 15 U.S.C. 13(b), which provides:

> Nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor; . . .

and the cooperative exemption of Section 4 of the Act, 15 U.S.C. 13c, which provides:

> Nothing herein shall prevent a cooperative association from returning to its members, producers or consumers the whole, or any part of, the net earnings or surpluses resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

STATEMENT

This proceeding was originated by two separate Federal Trade Commission complaints against petitioners alleging violations of subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C. 13(f)], which bans the knowing receipt of unlawful price discriminations. During the early hearing stages, it was agreed by the parties that "these two proceedings be tried concurrently and considered as one case" (R. 92).[1]

Petitioners are two cooperative associations organized, existing and doing business under the laws of Tennessee and Mississippi, respectively, and their member independent jobbers engaged in the resale of automotive parts and

[1] All "R" references herein are to designated pages of the printed Transcript of Record in the Court of Appeals.

supplies in competition with chain stores, with the dealer organizations of automobile manufacturers, with oil and rubber companies, and with other jobber organizations in the automotive replacement market. Petitioners formed these cooperative associations in an attempt to achieve a degree of competitive equality with their larger, more aggressive, integrated rivals (see pp. 16-18, *infra*).

The purpose underlying formation of these associations was summed up by one witness:

> There are a lot of reasons why I joined Cotton States, but to sum it up briefly I would say I joined Cotton States to stay in business. The evolution in the automotive parts industry has brought about a condition that dictated that we either affiliate ourselves either through sale or part ownership or some other means with a chain and we have been approached on that, or align ourselves with someone that would enable us to stay in a competitive position and if we hadn't done that a good many years ago I believe we would have been out of business (R. 1042-1043).

At the time of organization of these cooperatives, and at the time complaint issued against petitioners, petitioners' suppliers made sales to all purchasers pursuant to openly published graduated-discount price schedules providing cumulative rebates geared to annual purchase volumes. These price schedules were available generally throughout the industry to all purchasers.

Petitioners' purchases were made by the cooperative associations, and earnings or surplus resulting from rebates for the annual purchases of the associations were distributed internally to individual member jobbers as patronage dividends. These dividends were proportionate to the amount of each member's purchases during the year. The earnings or surplus so distributed and received constitute the "discrimination" attacked in this proceeding (R. 99-100).

In 1938, these cooperative purchasing practices of petitioners were the subject of full investigation by the Federal Trade Commission. No action was taken by the Commission and petitioners "were given to understand that the file was closed" (R. 911).

The Commission's complaint against petitioners issued in May 1950, charging that petitioners, through receipt of cumulative volume rebates in 1949, had violated subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. Subsection 2(f) provides in relevant part:

> That it shall be unlawful for any person, engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price . . . .

On the same date, May 1, 1950, the Commission issued a series of complaints against petitioners' sellers, charging that the cumulative discount schedules violated subsection 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which bars discrimination in price between different purchasers of commodities of like grade and quality

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . .[2]

At the time of issuance of these complaints, neither the Commission nor any court had ever adjudicated the legality of these pricing practices. These Commission proceedings became known as the *Automotive Parts* cases.[3]

In 1953, this Court rendered its landmark decision in

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[2] This prohibition is not absolute, but is subject to a number of defenses and provisos, principal among which are the so-called cost justification and meeting competition defenses. 15 U.S.C. 13(a), (b). The Act also provides certain exemptions for cooperative associations.

[3] See footnotes 7-9, *infra*.

Automatic Canteen v. *Federal Trade Commission*, 346 U.S. 61, holding that subsection 2(f) did not reach the receipt of *every* price discrimination barred by the statute, but only those price discriminations "known [by the buyer] not to be within one of the [seller's] defenses", 346 U.S. at 74.

In June, 1953, following the Supreme Court's ruling in *Automatic Canteen*, the Commission consolidated both of these complaints for trial. 50 F.T.C. 952 (1954).

On October 7, 1954, Commission counsel closed the presentation of evidence in support of the complaint. Evidence was thereafter presented by petitioners in defense. Sixteen of petitioners' members testified that they were advised by all suppliers that the prices offered petitioners were cost justified or granted in good faith to meet the equally low price of a competitor. This testimony was uniformly corroborated by supplier witnesses. Hearings were concluded in December, 1957.

The Hearing Examiner's Initial Decision was entered on July 7, 1958 (R. 90-118). Ruling that evidence that petitioners relied upon supplier representations as to cost justification "must be rejected," the Examiner found that petitioners knew or should have known in 1949 that these prices were *not* cost justified because petitioners "knew the facts of life so far as the automotive parts market was concerned" (R. 112-13). "Furthermore," the Examiner found, "the jobber respondents [petitioners] were placed upon notice as to the illegality of price discriminations received through the medium of group-buying organizations, including Mid-South Distributors and Cotton States, Inc., by the initial decisions of the Hearing Examiners and the decision of the Federal Trade Commission and the Circuit Courts of Appeals in the following cases . . ." (R. 113). The decision then cited to the six *Automotive Parts* seller cases affirmed in the courts, 1955-1957. Conspicuously, the Hearing Examiner made no finding with respect to peti

buyers' knowledge of their sellers' meeting competition defense.

On February 24, 1959, the Commission entered its final decision, adopting the findings, conclusions, and order of the Hearing Examiner (R. 119-127). In an accompanying opinion, the Commission stated that the burden of the complaint included

> . . . a showing that the buyer knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless, induced or received the discriminatory prices (R. 123).

Rejecting the record evidence that petitioners were advised by their suppliers that their prices were cost justified—and again stressing the post-complaint findings of illegality in the *Automotive Parts* cases—the Commission found that petitioners' "trade experience" afforded the requisite statutory knowledge of the absence of cost justification.

The Commission also sought to correct the failure of the Initial Decision to make *any* finding as to petitioners' knowledge of their sellers' meeting competition defense. Rejecting the undisputed evidence that their suppliers regularly advised petitioners that prices were made to meet competition—and without citation to any contrary evidence—the Commission held that petitioners *knew* there could be no meeting competition defense because they *knew* that the prices were not cost justified, hence, "would not be lawful prices" (R. 125).[4] The Commission's ruling

[4] This finding as to buyers is ironic. In two early seller cases, the Hearing Examiner refused to impute such knowledge to the *sellers* themselves:

> "To say that Respondent, in 1949, knew its own discounts to be unlawful when complaint herein was not issued until a year later, and respondent is still contending its discounts to be lawful, and then to build on this basic fallacy the argument that it must therefore have known that a competitor with

thus nullified *Automatic Canteen's* holding that knowledge of the two defenses constituted *separate* proof elements.

Petition for review was filed in the Court of Appeals for the Fifth Circuit, under 15 U.S.C. 21, on July 6, 1959. On February 23, 1961, the Court of Appeals affirmed the Commission's order.

Initially, the Court defined the relevant area of competition as that between petitioners and

> (a) the large chain stores, the nationally integrated oil company and tire company outlets, and authorized dealers of the huge automotive manufacturers,

and

> (b) other independent individual jobbers who are neither within (a) nor a member of a Co-op buying group (p. 3a, *infra*).

The Court conceded the heavy competitive pressures which inspired the formation of petitioner association:

> Nothing is left to the imagination as to the origin of the Co-ops or the reasons for it. Petitioners' brief frankly states that they ". . . formed the cooperative associations . . . for the purpose of achieving a measure of competitive parity with their larger, more aggressive rivals . . ." meaning those in group (a) (p. 3a, *infra*).

But, said the Court, "not a word" was said by petitioners "about what happens to those in group (b)" who "will feel the pinch not only of the huge competitors in group (a) but that of [petitioners] as well" (p. 3a, *infra*).

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partially parallel costs must be charging similarly unlawful prices, not cost-justified because respondent's were not, is to pile inference upon inference. This contention is rejected." *E. Edelmann & Co.*, 51 F.T.C. 978, 997 (1955). *Accord, C. E. Nichoff & Co.*, 51 F.T.C. 1114, 1133 (1955).

As to *these* competitors, the Court said, the evidence was sufficient to show that petitioners had received illegal price discriminations:

> A Member-Jobber obtained substantially the same type and quantity of goods at a price substantially lower than his group (b) independent competitors. That hurt. That hurt the less-favored purchasers. It was that injury which Congress sought to prohibit (pp. 7a-8a, *infra*).

But this showing, the Court acknowledged, was only one "phase" of the Commission's burden of proof. Under *Automatic Canteen* the Court asserted,

> it is not sufficient merely to show the receipt of a price differential which likely would injure. . . . it is essential that the Commission go further and establish that the buyer had reason to know that the seller could not meet either [a cost justification or meeting competition] defense (p. 9a, *infra*).

The Court found both of these additional proof requirements met:[5] Order and shipments to petitioners "were handled exactly the same" as those to their independent jobber competitors; petitioners knew that "this procedure represented no real savings in cost to the seller." And "the co-ops were not formed to give suppliers an opportunity to meet competition with other suppliers," but to obtain for members a price not available outside the co-op, so petitioners could not urge that they were entitled "to assume that the supplier was extending such price differentials as a means for meeting competition with other suppliers" (pp. 10a, 13a, *infra*).

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[5] The Court failed to consider petitioners' contentions that the record must also show they knew that the price discriminations were injurious to competition and not within the statute's cooperative exemption (See pp. 16-18 and 22, *infra*).

Having affirmed the Commission's decision, the Court acknowledged the likely unfairness of its ruling. It concluded:

> If this is to entrench further the large chain-store automobile-gasoline-dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member-Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one. When David slays Goliath no one else may be hurt. That is what the Commission determined was the result here (p. 14a, *infra*).

REASONS FOR GRANTING THE WRIT

Eight years ago, in *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61, this Court firmly fixed standards governing liability of buyers for price discrimination under the Robinson-Patman Amendment to the Clayton Act. This petition raises fundamental first questions regarding the application of those standards in the Act's administration. If granted, the petition will present these important questions to the Court for the first time.

Misconstruing the controlling principles of *Automatic Canteen*, the Commission and the Court of Appeals have achieved a result directly contrary to Congress' purpose in enacting Robinson-Patman. Unless corrected, it will have far-reaching oppressive consequences upon the ability of small buyers, throughout the nation's economy, to compete in markets increasingly dominated by great rivals.

This Court has recently reminded that the Robinson-Patman Act was "motivated principally by Congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores." *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 544 (1960). The statute was designed to impede the coercive tactics of large buyers wielding heavy economic pressures

on their suppliers and to preserve the competitive vitality of smaller competing buyers "lacking the purchasing power to demand comparable advantages" and thus "at a hopeless competitive disadvantage." *F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959).

Petitioner cooperative associations were formed in an effort to achieve a measure of competitive parity with their larger, more aggressive, integrated rivals in the resale of automotive parts and supplies. Heavily disadvantaged by price concessions granted to chain stores, automobile dealers, and oil company and rubber company outlets, increasingly foreclosed by these competitors from their traditional position in the automotive parts after-market, petitioners sought through cooperative activity to obtain comparable bargaining leverage with suppliers (See pp. 17-18, *infra*).

This, classically, was the market imbalance at which the Robinson-Patman amendment to the Clayton Act was aimed. As construed by the Court below, however, the Act has now become a vehicle "to entrench further" these large competitors and to "aggravate, not lessen, the competitive disadvantage" which *petitioners* must bear.[6] Admittedly "bad economics" and "bad social policy", the decision flouts Congress' "rational basis" in enacting the legislation, *F.T.C.* v. *Simplicity Pattern Co.*, *supra*, at 68, and results in bad law as well.

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[6] *Cf.* Edwards, "The Price Discrimination Law—A Review of Experience", Brookings Institution (1959). In criticizing Commission enforcement of the statute after 25 years, Professor Edwards says:

> The law has curbed not only the practices of the powerful, but also the practices of others designed to furnish protection against the powerful. Flexible adjustments designed to give independent small concerns some of the buying advantages of chain stores have been struck down where . . . they gave associations of independent merchants power comparable to that of the great buyers. The capacity of the independent to protect himself has been weakened . . . (at p. 626).

With only faint deference to the letter of *Automatic Canteen*, the Court of Appeals substantially disregarded this Court's firm injunction that there must be a probing inquiry into the buyer's *knowledge* of illegality. The decision below exhumes a standard of illegality, expressly denounced in *Automatic Canteen*, which would leave the word "knowingly" almost entirely without significance in Section 2(f). 346 U.S. at 71. "We do not overwork a faithful figure", the Court of Appeals asserts, "to say that this is the other side of the [price discrimination] coin. For here it really is" (p. 1a, *infra*).

This oversimplification produces the Court's error. Subsection 2(f) does *not* simply reflect 2(a). 2(f) adds a fundamental new proof element: knowledge. Yet implicit in almost every line of the Court's decision—and of the decision of the Federal Trade Commission before it—is the equation of the *fact* of price discrimination with *knowledge* of that fact. The Court's final, painful apology ironically confirms its error. The Commission order is justified, says the Court, because "one caught in the middle cannot, to ward off his huge and overpowering rival, injure, *even unwittingly*, a smaller one." (p. 14a, *infra*, emphasis added) Yet it is exactly the *unwitting, unknowing* nature of petitioners' act which bars 2(f) liability.

Nor can such limitation on *buyer* liability in any way defeat the purposes of the Robinson-Patman Act nor inhibit the Commission in banning unlawful price discriminations where they occur. The Commission has plenary authority to halt injurious price discriminations by proceeding against the discriminating *sellers* under subsection 2(a)—as it has, in fact, done here. There is no purpose in antitrust policy for further oppression of small buyers "caught in the middle."

An understanding of the historical context in which this case arises is critical to a fair judgment. Petitioners are charged with knowingly receiving unlawful cumulative

volume rebates from their suppliers in 1949. At the time of issuance of the Commission's complaint, these price schedules were traditional throughout the automotive parts industry; they had never been adjudged illegal nor, in fact, challenged by the Commission. Petitioners' purchasing practices had, however, been investigated by the Federal Trade Commission some ten years before. No action was taken and petitioners "were given to understand that the file was closed" (R. 911).

With the complaint against petitioners, complaints were also issued against several of petitioners' suppliers charging unlawful price discrimination in the use of these pricing schedules. A number of similar complaints were issued against other suppliers in succeeding years.

Litigation of petitioners' case was suspended pending disposition of the seller cases, which were fiercely litigated before the Commission and in the Courts over a number of years. All suppliers defended on grounds that the price differentials had not caused competitive injury. The suppliers defended, as well, on grounds that the price differentials were either cost justified or granted in good faith to meet competition, or both. These defenses were rejected by the Commission,[7] one Commissioner, however, strenuously dissenting in four cases on grounds that no injury had been established.[8] The Commission's orders

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[7] In two seller cases, however, the Hearing Examiner upheld evidence of cost justification. *C. E. Nicholl & Co.*, 51 FTC 1114, 1138 (1955). *Thompson Products, Inc.*, 1959 CCH Transfer Binder, Par. 27,841. In *Thompson*, after modifying the order, the Commission adopted the Initial Decision.

[8] *Moog Industries, Inc.*, 51 F.T.C. 931, 951 (1955); *P & D Manufacturing Co.*, 52 F.T.C. 1155, 1175 (1956); *P. Sorensen Manufacturing Co., Inc.*, 52 F.T.C. 1659, 1673 (1956); *Whitaker Cable Corp.*, 51 F.T.C. 958, 977 (1955).

were ultimately affirmed in the Courts of Appeals in the years 1956 to 1959."

Subsequent to the first Commission rulings in the seller cases, the trial of this case was resumed; but the shadow of the seller cases thereafter fell heavily on every stage of the proceeding. Stripped of its elaborate ratiocination, the decision of the Court of Appeals—like the decision of the Commission and of the Hearing Examiner before it says simply this: If a seller is held liable for price discrimination, his favored buyers *must* also be liable.

According to the logic of the Court and the Commission, these buyers had the clairvoyance to know in 1949 that the prices they received had a tendency to injure competition, were not cost justified and were not made to meet competition, *despite* the fact that for the next ten years there was fierce disagreement over these difficult questions of law among the most sophisticated antitrust authorities.

Yet this history is of no account either to the Court of Appeals or to the Commission. They would still charge these local businessmen, untutored in the intricacies of antitrust, with guilty prescience, a year before the prices were first challenged by the Federal Trade Commission, six years before the first Commission ruling, seven years

" *Standard Motor Products* v. *F.T.C.*, 265 F. 2d 674 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *P. Sorenson Mfg. Co.* v. *F.T.C.*, 246 F. 2d 687 (D.C. Cir. 1957); *P & D Mfg. Co.* v. *F.T.C.*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied* 353 U.S. 938 (1957), *rehearing denied*, 353 U.S. 962 (1957); *C. E. Nichol & Co.* v. *F.T.C.*, 241 F. 2d 37 (7th Cir. 1957), *modified* 355 U.S. 411 (1958), *rehearing denied*, 355 U.S. 968 (1958); *Moog Industries* v. *F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *affirmed* 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Thompson Products, Inc.*, 1959 CCH Transfer Binder, Par. 27,841.

before the first Court of Appeals ruling, and nine years before they were ultimately laid to rest by this Court.

The Errors in the Court of Appeals Decision

The Court of Appeals has committed four fundamental errors in finding the statute's required proof of knowledge. Each is sufficient to invalidate the Court's decision.

(1) The Failure to Consider Whether Petitioners Knew the Price Differentials Injured Competition

The Court failed entirely to consider, as required by *Automatic Canteen*, whether petitioners knew that they were receiving "prohibited discrimination in prices," i.e., one which had the adverse competitive effect proscribed by the statute. "So far as the specific element of discriminatory injury is concerned," the Court stated,

> the government's § 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors. . . . This phase is not bound up with the buyers' *knowledge* that the seller would be unable to justify the differential (p. 8a, *infra*, emphasis in original).

This is clear error. Prior to any inquiry with respect to the buyer's knowledge of the seller's justification, *Automatic Canteen* compels an inquiry into the buyer's knowledge that the price differential was an injurious one. This construction of *Automatic Canteen* was frankly acknowledged by the Commission itself in holding that before it reached questions of justification, the Commission must show that "the buyer knew of the price differentials *and of their probable competitive effect*" (p. 18a, *infra*, emphasis added). Had the Court of Appeals made such inquiry, it would have found that the record does not permit the *remotest* inference that petitioners *knew* that the prices received by them had a competitive effect condemned by the statute, or any injurious effect; petitioners *hoped* that they might be able to compete more effectively

through their cooperatives with their larger, more aggressive, and more favored competitors.

In fact, despite the Court of Appeals' deep solicitude for the plight of petitioners' "group (b)" competitors—the independent jobber not affiliated with a cooperative—the record is almost totally silent either as to the actual existence of such competitors or the effect of the challenged price discriminations upon them. In this 1300 page record, the *only* testimony adduced with respect to independent jobbers was the testimony of three such witnesses covering 17 pages (R. 168-173, 788-796, 827-831). These jobbers did not testify as to which, if any, of the 24 petitioners they competed with, nor was there testimony elsewhere in the record as to whether there were *any* other independent jobbers actually competing with petitioners. The record, on the other hand, abounds with evidence of the virulence of the competition of petitioners' larger "group (a)" rivals.

But even assuming that these three jobbers were representative of a class of independent jobbers in competition with petitioners, and that they had been seriously disadvantaged by their inability to obtain top-volume rebates on their suppliers' pricing schedules, there is no basis in this record for finding that they were injured by *petitioners'* purchasing practices. In the context of this industry, the inference is far more logical that they, like petitioners, were hurt by the buying practices of their larger, integrated competitors against whom petitioners were reacting. *Cf. Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 250 (1951).

The record shows that petitioners' single purpose in organizing the cooperatives was to enable them to purchase from their suppliers on terms more nearly equal to the favored terms received by competitors such as automobile dealer organizations, chain stores, and oil and rubber company outlets. It is self-evident that members of *any*

cooperative are similarly motivated. Typically, representatives of petitioners testified:

> If we hadn't [formed the association] a good many years ago I believe we would have been out of business (R. 1043).
>
> We were faced with competition from a company considerably larger than we were, that was in a position to buy merchandise cheaper than we were . . . and . . . in order to offset that competition and to operate on an even basis some organization was necessary . . . (R. 278).
>
> [It was a] means for all of us to stay in business. We just had to have some way of meeting that competition (R. 953).

The record shows that the true competitors of petitioners were larger, stronger, more aggressive, more prosperous, and the beneficiaries of more favorable prices and greater discounts from automotive parts suppliers. The record describes a harsh struggle for survival by petitioners in a market which had increasingly become dominated by large, integrated buyers able, apparently without legal barrier, to obtain deep price concessions from their suppliers. Witness after witness testified to these oppressive competitive conditions (see, e.g., Shipp, R. 237; Fife, R. 695; Anderson, R. 713; Taylor, R. 779-91, 833, 839, 846; Ginsburg, R. 794; Griener, 803-804; Robinson, 948-949; Gates, 965; Hamil, 1136-1141). The only "probable competitive effect" known by petitioners to flow from the prices they received through the association was the hope that they might survive competitively in the face of severe competition from larger buyers.

(2) The Evidence With Respect to Petitioners' Knowledge of Cost Justification

The Court of Appeals erred in finding that petitioners knew that the prices they received were not cost justified; the finding is directly contrary to *all* evidence of record. The Court has failed to make that "fair assessment" of the whole record which would limit interposition of

this Court's supervisory authority. *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 401 (1958); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951).

The Court's decision is based upon its finding that "for all practical purposes, the orders and shipments to petitioners were handled exactly the same [as sales to independent jobbers] . . . . The buyer knew that this procedure represented no real saving in cost to the seller." This finding adopted the substance of the Commission's earlier finding "that trade experience in a particular situation can afford a sufficient degree of knowledge," (R. 123) which in turn finds its roots in the statement of this Court in *Automatic Canteen* that

> Trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, can fairly be charged with notice that a substantial price differential cannot be justified (346 U.S. at 79).

But this uncritical attempt to blanket the facts of this case into the "trade experience" dictum of *Automatic Canteen* cannot withstand scrutiny.* The record elaborately discloses that petitioners had every reason to believe that a substantial cost saving accrued to their suppliers. Every jobber witness testified that petitioners were regularly advised by their suppliers that the prices granted them were justified by promotional, selling and administrative savings to them, and this testimony was uniformly corroborated by supplier witnesses. These witnesses were subjected to searching cross-examination by Commission counsel in an effort to force them to relinquish their view; yet uniformly they held firm to their conviction that the prices were cost justified (e.g., R. 877-878, 254-255, 279, 989, 1135-1137).

But the evidence was not limited simply to a recount of claims of cost justification by sellers. Petitioners' wit-

nesses detailed in length the *types* of cost savings which they believed their operations permitted, repudiating the Court's finding that they knew that there could be "no real saving in cost" to their suppliers. In Appendix D of this petition, we have excerpted representative testimony to show the breadth and detail of this evidence. None of this evidence was disputed by Commission counsel, nor was contrary evidence adduced. And petitioners had every reason to place reliance upon their suppliers' representations; they were not bound to assume that their suppliers were wrongdoers. *U. S.* v. *Detroit Timber and Lumber Co., et al*, 200 U.S. 321, 331 (1906).

Moreover, either through error or oversight, the Court's decision mistakenly asserts that:

> the record actually contains positive evidence that at least three of the major suppliers acknowledged [at trial] that they could not justify the price reductions on the basis of lower costs (pp. 11a-12a, *infra*).

This finding—upon which the Court laid primary stress—is inexplicable. The record contains no such evidence. Supplier witnesses in this case *refused* to renounce their previously held views that the prices were cost justified (see e.g., R. 1135-1141), and every supplier or jobber witness so questioned testified that he *still* believed the prices cost justified (see Appendix D, p. 22a, *infra*).

(3) The Evidence With Respect to Petitioners' Knowledge of Meeting Competition

The Court of Appeals disregarded the uncontroverted record evidence showing petitioners' reason to believe that the prices received were within the sellers' meeting competition defense, solely on the ground that initiative in price negotiations was ordinarily taken by petitioners. The Court said:

> A buyer earnestly negotiating with a supplier to obtain from such supplier the benefit of that supplier's volume discount tables already in effect can certainly not urge that he was entitled to assume that the

supplier was extending such price differentials as a means of meeting competition of the other suppliers (p. 13a, *infra*).

This same contention was rejected by this Court in *Automatic Canteen* where it refused to put the buyer "at his peril whenever he engages in price bargaining." 346 U.S. at 73. Moreover, the record is clear that there was no simple *assumption* by petitioners; the record shows their continuing reason to believe the existence of such justification. And even this standard is too strict. Petitioners need not show that they *affirmatively* knew the sellers could justify on the basis of meeting competition defense. The record need only show, despite the Court of Appeals' disparagement of *Automatic Canteen's* "awkward double negatives" (p. 13a, *infra*), that they did not know that the defense was *not* available. 346 U.S. at 74.

Once again, the Court of Appeals has failed to make a "fair assessment" of the record on this element of proof. *F.T.C.* v. *Standard Oil Co.*, *supra*. The suppliers' testimony shows that they repeatedly advised petitioners that their prices were made to meet competition with other sellers (R. 690-692, 717, 728-729, 933-936, 975-976, 1012), and petitioners uniformly testified that they were so advised. Moreover, the Commission's own action, in bringing multiple cases against petitioners' suppliers challenging the *same* pricing systems clearly demonstrates the existence of such prices generally in the industry and strongly supports an inference that, so far as petitioners knew, the prices *were* being offered by these suppliers to meet competition. Not until the ultimate affirmance of the *Automotive Parts* cases in the courts in the years 1956 to 1959 was the availability of the defense under such circumstances *finally* decided.[10] But the fact that at a much later date, in a series of sharply litigated cases, the prices were held not to be within the sellers' defense is wholly irrelevant to

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[10] See e.g., *Edelmann* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956); *Standard Motor Products* v. *F.T.C.*, 265 F. 2d 679 (2nd Cir. 1959).

the question of petitioners' knowledge of this fact 8 to 10 years earlier.

(4) The Failure to Consider Whether Petitioners Knew the Prices Were Not Within the Cooperative Exemption

The Court of Appeals erred in failing to consider petitioners' contention that they did not know that the prices received were *not* within the seller's cooperative exemption. Section 4 of the Robinson-Patman Act provides that:

> Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Before the Commission and the Court of Appeals, petitioners strenuously urged that the pricing practices challenged were exempt under Section 4. We do not here press that contention beyond its inclusion as an element demonstrating petitioners' lack of knowledge of illegality. The record shows that petitioners were organized as nonprofit cooperative associations under applicable state law, and their corporate charters consistent with Section 4 explicitly provide that the association "will return to its members the whole of the net earnings or surplus resulting from its trading operations in proportion to their earnings from, to, or through the association" (R. 677). The record also shows that subsequent to the enactment of Robinson-Patman, the Federal Trade Commission investigated the operations of petitioners and closed the file without action (R. 911). Petitioners had every reason to believe that their activities *were* within the cooperative exemption—the fact that the Court of Appeals ten years after the event held the contrary is irrelevant—and the Court erred in not so finding.

CONCLUSION

The decision of the Court of Appeals conflicts with the basic legislative aims of the statute and undermines this Court's decision in *Automatic Canteen* v. *F.T.C.* It raises a question of primary significance in the administration of this important antitrust law not previously ruled upon by this Court. We urge that this petition for a writ of certiorari be granted.[11]

Respectfully submitted,

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[11] This is the second petition for a writ of certiorari to reach the Court this term challenging a Federal Trade Commission order under subsection 2(f) of the Robinson-Patman Amendment to the Clayton Act. See *American Motor Specialties* v. *F.T.C.* (No. 368), 278 F. 2d 225 (2nd Cir. 1960), *cert. denied* 364 U.S. 884 (1960). While the *American Motor* petition raised a question with respect to whether the Commission had met its burden of proof under 2(f), it was only one of five major questions presented, the others relating to such disparate issues as failure to allege interstate commerce, conflict with the New York Cooperative Corporations Law, and incompetence of certain documents admitted into evidence. Moreover, the questions presented here raise different substantive issues from *American Motor Specialties*, and petitioners' citations of error there were wholly different from those urged here.

Of course, a denial of a petition for writ of certiorari "imports no expression of opinion upon the merits of the case, as the Bar has been told many times." *U. S.* v. *Carver*, 260 U.S. 482, 490 (1923). See also *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-920 (1950).

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,860

MID-SOUTH DISTRIBUTORS, ET AL. and COTTON STATES, INC., ET AL., *Petitioners*,

versus

FEDERAL TRADE COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Trade Commission

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(February 23, 1961.)

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge.

BROWN, Circuit Judge: We do not overwork a faithful figure to say that this is the other side of the coin. For here it really is. In a series of cases appealed from adverse decisions of the Federal Trade Commission, four Courts of Appeals have now held in seven cases[1] that

[1] Standard Motor Products v. FTC, 2 Cir., 1959, 265 F. 2d 674, cert. denied, 361 U.S. 826, 80 S. Ct. 73, 4 L. Ed. 2d 69; P. Sorensen Mfg. Co. v. FTC, D.C. Cir., 1957, 246 F. 2d 687; P & D Mfg. Co.

manufacture-sellers violated § 2(a) of the Robinson-Patman Act by selling automotive parts at discriminatory prices through volume rebates extended either directly to individual buyers or to them through buyer-groups. Here, as did the Second Circuit in its recent case[2] we deal with FTC's cease and desist order against *buyers* for having *bought* at discriminatory prices contrary to § 2(f).[3]

The petitioners are two cooperative buyer groups, Mid-South Distributors and Cotton States, Inc., and the 23 jobbers who are members of Mid-South and Cotton States. The member companies are engaged as jobbers in the sale and distribution of automotive parts through many of the southern states. The prices at which they sell to their customers are not in question here. What, and all that is involved, is the price at which the manufacturer-supplier sells to them. There are thus three categories immediately involved, the thumbnail descriptives of which reflect the respective functions of each: (1) the Co-ops, (2) the Member-Jobbers, and (3) the Suppliers. All of the three have immediate connection with the sales and prices in controversy here. In addition to these three there is another element of this economic community—the competitors of Member-Jobbers.

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v. FTC, 7 Cir., 1957, 245 F. 2d 281 cert. denied, 355 U.S. 884, 78 S. Ct. 15, 2 L. Ed. 2d 114; C. E. Niehoff & Co. v. FTC, 7 Cir., 1957, 241 F. 2d 37, modified Moog Industries v. FTC, 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370; Moog Industries v. FTC, 8 Cir., 1956, 238 F. 2d 43, affirmed 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370; E. Edelmann & Co. v. FTC, 7 Cir., 1956, 239 F. 2d 152, cert. denied, 355 U.S. 941, 78 S. Ct. 426, 2 L. Ed. 2d 422; Whitaker Cable Corp. v. FTC, 7 Cir., 1956, 239 F. 2d 253, cert. denied, 353 U.S. 938, 77 S. Ct. 813, 1 L. Ed. 2d 761.

[2] American Motor Specialties Co. v. FTC, 2 Cir., 1960, 278 F. 2d 225.

[3] "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 USCA § 13(f).

These in turn are made up of concerns which may be divided roughly into two groups. In one group will be (a) the large chain stores, the nationally integrated oil company and tire company outlets, and authorized dealers of the huge automotive manufacturers. The other group will comprise (b) other independent individual jobbers who are neither within (a) nor a member of a Co-op buying group. In the main we think it is petitioners' unwillingness, or at least failure, to take cognizance of group (b) that underlies nearly all of their objections to the FTC order under review.

Nothing is left to the imagination as to the origin of the Co-ops or the reasons for it. Petitioners' brief frankly states that they "* * * formed the cooperative associations * * * for the purpose of achieving a measure of competitive parity with their larger, more aggressive rivals * * *," meaning those in group (a). It was, they assert, this "enormous bargaining leverage of these integrated distributive organizations [group (a)] * * *" and purchases by independent jobbers "inevitably at higher prices * * *" which foreclosed "their traditional competitive position in the automotive parts after-markets." Later on they declare "Petitioners are neither judges, antitrust lawyers, nor soothsayers; they are simply local businessmen operating in a fiercely competitive industry dominated by far larger integrated competitors [group (a)] Petitioners joined in these cooperatives for the sole purpose of achieving some measure of competitive parity with these rivals. * * *."

Not a word is said about what happens to those in group (b) who, if the program of the Co-ops and the Member-Jobbers is successful, will feel the pinch not only of the huge competitors in group (a) but that of the Member-Jobbers as well.

The system inaugurated and followed is a very simple one. It came into being because of the traditional

pricing plan in the automotive parts business. Suppliers had basic list prices. Specified successively greater percentage reductions off the list price were offered to jobbers for specified increases in dollar volume of purchases.[4] These cumulative volume rebates and graduated price schedules were accorded all purchasers and were available generally throughout the industry. To achieve these graduated dollar volume levels, the purchases for Member-Jobbers were made by the Co-op. The volume discounts were computed on the basis of the total purchases for all Member-Jobbers through the Co-op. After deducting the small operating expenses of the Co-op, these volume rebates were distributed internally to Member-Jobbers as patronage dividends proportionate to each Member-Jobber's purchases for the year. The effect of this was to give Member-Jobbers a substantially lower cost than would have been paid for the same kind and quantity of goods by such jobber individually or by an independent jobber—those in group (b).

The Commission determined that these volume discounts through the guise of purchases by the Co-ops were an unlawful discrimination in price likely to lessen competition or cause injury to the less favored competitors of the Member-Jobbers—those in group (b). The Commission further held that these activities of Member-Jobbers as well as the Co-ops constituted "knowingly to induce or receive a discrimination in price which is prohibited" by the Act. § 2(f), note 3, supra. Cease and desist orders were entered against all.

The petitioners assert two principal complaints by this appeal. First, the operative effect of the order is to

[4] The seller cases, note 1 supra, related primarily to this basic volume rebate system, rather than the use of such a system in sales through the guise of buyer cooperative groups. Of course, this traditional volume rebate plan was not finally condemned until 1954-1956.

prohibit distribution of net earnings by a cooperative contrary to the freedom to do so explicitly recognized by § 4 of the very same Act.[5] Second, the evidence was insufficient to establish a violation of § 2(f). This latter breaks off into about three subdivisions.[6] The only substantial one is the contention that the Commission failed to meet its burden of proving the petitioners knew that the Suppliers could not justify such preferential prices as either a § 2(a) lower-cost or a § 2(b) meeting-of-competition.

Neither the status as a cooperative nor § 4, note 5, *supra*, affords the insulation here asserted. The order of the FTC does not undertake to prohibit distribution of earnings. The order, on the contrary, strikes at the jugular—the transactions which beget the so-called earnings. The petitioners virtually concede—and in conceding give up nothing in view of *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 1960, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880, as well as others—that § 4 gives no immunity to the Co-op as an entity. It must, as would any other organization of comparable

[5] "Nothing in this Title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." 15 USCA § 13b.

[6] These contentions briefly are:

1. There is no evidence that Member-Jobbers are "engaged in commerce."

2. There is no evidence that Member-Jobbers or the Co-ops received any "discrimination in price."

3. There is no evidence that they "knowingly" induced or received prohibited price discrimination as petitioners did not have "knowledge" that the lower prices they paid (a) would have an adverse effect on competition, (b) were not justified by savings in sellers' costs or (c) were not offered by the selling suppliers to meet competition.

size, respect the prohibitions against discriminatory price differentials.

But petitioners insist that since the FTC order does not purport to find any discrimination in the price charged by Suppliers as between these Co-ops and other buyer groups or entities for like purchases, the effect of this order is to infringe upon the *internal* operation of a cooperative. So long, the argument continues, as the cooperative as an entity refrains from actions violative of the anti-trust statutes, it may be used freely for purchases for the benefit of the Member-Jobbers with the unrestricted right to return to them "the net earnings * * * resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

The § 4 exemption has no such purpose. It recognizes cooperatives as valid organizations. But it does not turn the entity loose to acquire on behalf of its members, through the guise of group purchasing, price differentials or other preferences to which each would not otherwise be entitled. *American Motor Specialities Co., Inc.* v. *FTC* 2 Cir., 1960, 278 F. 2d 225, 229; *Quality Bakers of America* v. *FTC*, 1 Cir., 1940, 114 F. 2d 393, 400; cf Maryland and Virginia Milk Producers Assn. v. United States, *supra*. We purposely leave to a future day the problem of delineating the activities which may rightfully come within the congressional purpose of leaving cooperatives "free to seek through co-operative endeavor the economies and savings of mass operations * * * " and assure to them "any real economies and savings to which mass operations entitle them * * *."[7]

[7] Congressman Utterback, chairman of the House Conferees, 80 Cong. Rec. 9415-19 (June 15, 1936). We are reminded quite recently that, despite his prominence in the handling of this statute in the legislative process, the congressional purpose is to be determined by the legislation as enacted and not necessarily the statements made by Congressman Utterback. FTC v. Anheuser-Busch, 1960, 363 U.S. 536, 553, 80 S. Ct. 1267, 4 L. Ed. 2d 1385.

We may put aside quickly the contention that there was inadequate proof either of interstate purchases or knowledge that the price differential constituted discriminatory injury or damage to competitors of the Members-Jobbers.

The first rests upon a total misconception of the transaction involved in this proceeding and under the Act. As to buyers, what the statute covers and forbids is the receipt of a discriminatory price differential in the *purchase* of goods from suppliers. It does not involve the resale of such goods by that buyer. Consequently the many cases[8] arising under the Fair Labor Standards Act, 29 USCA §§ 201-19, testing resales after receipt of the goods in interstate commerce are of utterly no relevance. Here it was overwhelmingly established that most, if not all, of the questioned purchases by the Member-Jobbers through the Co-ops moved directly in interstate commerce.

The second contention—inadequacy of the evidence to establish an injurious discriminatory price or knowledge thereof—apart from the problem of the burden of proof which we discuss subsequently—is merely the reiteration of a contention now rejected in every one of the seller cases, note 1, *supra* Whether a price differential has the reasonable likel ıood of injury to competitors is the identical question whether the inquiry concerns those who sell or those who buy at such prices. A simple, but awesome, economic fact was overwhelmingly proved—a Member-Jobber obtained substantially

[8] Mitchell v. Livingston & Thebaut Oil Co., 5 Cir., 1958, 256 F. 2d 757; Mitchell, Secretary v. C & P Shoe Corp., 5 Cir., 1960, ... F. 2d .... [No. 18352, Dec. 23, 1960]; Allesandro v. C. F. Smith Co., 6 Cir., 1943, 136 F. 2d 75; Spencer v. Sun Oil Co., D.C. D. Conn., 1950, 94 F. Supp. 408; Brenner v. Texas Company, N.D. Cal., 1956, 140 F. Supp. 240, 243; Dial v. Hi Lewis Oil Co., W.D. Mo., 1951, 99 F. Supp. 118; Roland Electric Co. v. Walling, 1946, 326 U.S. 657, 666-667, 66 S. Ct. 413, 90 L. Ed. 383.

the same type and quantity of goods at a price substantially lower than his group (b) independent competitors. That hurt. That hurt the less favored purchasers. It was that injury which Congress sought to prohibit. *FTC* v. *Simplicity Pattern Co.*, 1959, 360 U.S. 55, 62-64, 79 S. Ct. 1005, 3 L. Ed. 2d 1079; cf. *FTC* v. *Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385. All persons—sellers or purchasers, corporate or animate—must now know, constructively or actually, that price discriminations which injure are prohibited. It is no defense either to sellers or buyers that either was ignorant of that much of the law's requirement. The differences in price, of course, may perhaps be justified by the seller to overcome the law's characterization of the difference as a prohibited discrimination. When that happens obviously no violation occurs. But that is because of justification, not the absence of economic injury. So far as the specific element of discriminatory injury is concerned, the Government's § 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors. Cf. *FTC* v. *Simplicity Pattern Co.*, *supra*, 360 U.S. 55 at 64. This phase is not bound up with the buyers' *knowledge* that the seller would be unable to justify the differential. Cf. *FTC* v. *Anheuser-Busch*, *supra*.

This is, of course, in sharp contrast to the §§ 2(a) and 2(b) lower-cost or meeting-of-competition defenses of the seller.[9] As to these, in a § 2(f) proceeding it is a

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[9] Lower-cost defense is found in § 2(a), 15 USCA § 13(a). This section forbids discrimination "in price between different purchasers of commodities of like grade and quality." Quantity, as such, was no longer to be an automatic basis for price differential. Under the Robinson-Patman Amendments that was to be handled by the proviso that nothing in the Act "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *." As to this the seller has the burden under § 2(b).

The meeting-competition defense is found in the proviso of § 2(b)

part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the price differential under either one or both. *Automatic Canteen* v. *FTC*, 1953, 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454.

Under that case it is not sufficient merely to show the receipt of a price differential which likely would injure. For the buyer "knowingly to induce or receive" a price "prohibited by this" Act, it is essential that the Commission go further and establish that the buyer had reason to know that the seller could not meet either defense. The decision hardly meant, however, to impose any rigid mechanical requirements. On the contrary, the Court's opinion reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences. Rarely will buyers have committed the crudities to permit categorical and direct proof. Of course, this is not to let down the bars. The imponderable, elusive nature of "costs" which led the Court to impose the laboring oar on the Commission rather than on the buyer makes it necessary that like protection—if not more so—be afforded the buyer where the attack is circumstantial. But within those limits much is available from which safely to draw reliable inferences.

With its 1306 printed pages and hundreds of detailed, tabulated exhibits, we could not begin to detail the evidence of this record. The sum of it, briefly compressed, is quite sufficient to show the basis for inferences

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that nothing in the Act "shall prevent a seller rebutting the prima-facia case * * * by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

of buyer knowledge of seller non-justification.[10] The outstanding factor is that as to a specific purchase order the particular Member-Jobber knew two things. First, the price he was obtaining through the Co-op was substantially lower than his group (b) competitors were required to pay.[11] Second, for all practical purposes, the order and shipment were handled exactly the same. It is true that the Member-Jobber forwarded the order to the Supplier on a Co-op order form which ostensibly reflected a purchase of the goods for the Co-op. But this order form showed that shipment was to be made to the specified Member-Jobber. The buyer knew that this procedure represented no real savings in cost to the seller. Invoices were, of course, sent by the Supplier to the Co-op which was presumably liable therefor. But the Member-Jobber as buyer knew that the volume discount was extended, not because of increased credit reliability acquired by the presence of the Co-op as a sort of guarantor, but solely because of the increased volume of total purchases. The buyer could not reasonably have entertained any idea that he was getting preferred treatment over his competitor because credit costs were less. Moreover, there was no proof that this is why Suppliers were selling at more favorable terms.

Of course, all of this occurred in the setting which the Trial Examiner aptly characterized as "the facts of life" of the automotive parts business. The simple truth was that these volume discount rebates were offered indiscriminately to jobbers as an industry-wide competitive practice. They were extended by Suppliers to

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[10] In the seller cases, note 1, supra, the principal defense has been the contention that there was no injurious discrimination. The § 2(a) lower-cost defense has been raised in some but has been consistently overruled. See Standard Motor Products v. FTC, 265 F. 2d at 676; C. E. Niehoff & Co. v. FTC, 241 F. 2d at 41.

[11] This is implicit in the structure of the volume rebate pricing system.

induce greater purchases and not because the narrow price differential in each minutely graduated price tier represented any real difference or savings in costs.[12] Everyone was doing it. Indeed, that is why these Co-ops came into being—their Member-Jobbers wanted to get in on the act.[13] The presentation to Suppliers by the Co-ops in seeking a discount arrangement was primarily one emphasizing volume only. The effort was not to convince a prospective Supplier that through the group purchases of the Co-op, economies would be effected. What was sought, and all that was sought, was parity with others who bought a like quantity. This was quite without regard to whether there were or were not savings.

In addition to these circumstances, the record actually contains positive evidence that at least three of the

[12] This is illustrated by one of the principal Suppliers volume rebate schedules on an annual retroactive basis:

Net purchases during each fiscal year	Retroactive Rebate (percent)
Under $1,000	None
$ 1,000 to $ 4,999	5%
$ 5,000 to $ 7,499	7½
$ 7,500 to $ 9,999	9
$10,000 to $12,499	10
$12,500 to $14,999	12
$15,000 to $17,499	14
$17,500 to $19,999	15
$20,000 to $22,499	16
$22,500 to $24,999	17
$25,000 to $27,499	18
$27,500 and over	19

[13] For example, in purchases from the same Supplier under its schedule, note 12, supra, a Member-Jobber's purchases totaling less than $1,000 and therefore subject to no volume discount nevertheless received at 19% discount through aggregation of all Member-Jobbers' purchases that year. Other Member-Jobbers with purchases warranting 5% discount likewise received 19% rebate, or an advantage of 14%. Out of a total of $33,482.88 group purchases through the Co-op, the Member-Jobbers received volume rebates which exceeded by $4,478.06 the amount that would have been received by the individual purchasers.

major Suppliers acknowledged they could not justify the price reductions on the basis of lower costs. Of course, under *Automatic Canteen* this would not automatically convict a buyer. Quite possibly a buyer in good faith could think that the seller was able to justify the cost differential even though that seller knew it could not. But it goes a long way. If the Supplier-sellers knew this—even though they were late facing up to the fact[14]—it is not unreasonable for the trier to conclude that no one in that business should seriously have entertained any notion to the contrary.[15]

Nor was a different conclusion compelled by testimony that on inquiry by Co-op representatives each of a great number of Suppliers assured the Co-op that it could justify the cost differential. As a technical matter, the testimony was a vague sort as to times places and persons. More than that, repeated parrot-like for a succession of companies indiscriminately including many who extended no volume discounts and from whom individual jobbers could buy cheaper than through the Co-ops, it amounted to nothing more than an assurance that the Suppliers would give the Member-Jobbers the dollar volume rebate benefits for the group buying of their individual needs.

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[14] Representatives of several Suppliers in testifying in this proceeding acknowledged that in seller case proceedings, see note 1, supra, accountant witnesses on behalf of such sellers acknowledged that the price differentials could not be cost-justified.

[15] Among other "facts of life" which gave meaning to all of these circumstances was the nature of the immediate activities in the operation of each of the Co-ops. In Cotton States, these were handled by an owner of one of the Member-Jobbers right along with his regular jobber activities. Mid-South had one employee doing essentially bookkeeping accounting work. There was no Co-op inventory, warehousing or distribution. There were undoubtedly annual or periodic meetings of the members affording certain prospective suppliers an opportunity to show their line. But the industry-wide practice of volume rebates rested on dollar volume of purchases only without regard to whether it was more, or less, convenient or inexpensive to such supplier.

Even less need be said of the § 2(b) seller justification to meet competition.[16] The Co-ops were not formed to give Suppliers an opportunity to meet competition with other Suppliers. The Co-ops were formed to get from Suppliers who were already committed to the volume rebate practices the benefit of that competitive method for individual jobbers through the pooling of orders. What was sought was not a benefit *for* one Supplier because individual jobbers could get a like advantage from another Supplier. What was sought was a benefit which the individual jobbers at their volume level could get from no one. The Co-ops, in an effort to show a lower-cost seller justification for the differential, stressed the value of sales service rendered by the Co-ops to Suppliers. In other words, it was almost invariably the case of the Co-ops seeking out the Supplier to obtain from a Supplier a volume discount contract. A buyer earnestly negotiating with a Supplier to obtain from such Supplier the benefit of that Supplier's volume discount tables already in effect can certainly not urge that he was entitled to assume that the Supplier was extending such price differentials as a means of meeting competition with other Suppliers. And yet, once we get out of the awkward double negatives[17] of the *Automatic Canteen* rule that is in effect what petitioners assert here.

[16] In none of the seller cases, note 1, supra, has this been successfully maintained. It appears to have been urged only in these: Standard Motor Products v. FTC, 265 F. 2d at 677; C. E. Niehoff Co. v. FTC, 241 F. 2d at 41; E. Edelmann & Co. v. FTC, 239 F. 2d at 156.

[17] "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or *not* known by him *not* to be within one of those defenses." 346 U.S. 61 at 74.

This was followed shortly by this statement. "Assuming, as we have found, that there is no substantive violation if the buyer did *not* know that the prices it induced or received were *not* cost-justified, we must in this case determine whether proof that the buyer knew that the price was lower is sufficient to shift the burden of introducing evidence to the buyer." 346 U.S. 61 at 74. (Emphasis supplied.)

The Commission therefore adequately sustained its burden of going forward with the evidence. And on the total evidence the Commission, applying correct legal standards, determined as finder of the fact that these volume rebates through the guise of Co-op purchases constituted price discrimination prohibited by the Act, that is, not within seller justification. There it ends.

If this is to entrench further the large chain-store automobile-gasoline-dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member-Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one. When David slays Goliath no one else may be hurt. That is what the Commission determined was the result here. The Act, on these facts, empowered it to order it stopped.

AFFIRMED.

JONES, Circuit Judge, concurs in the result.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1960

No. 17,860

MID-SOUTH DISTRIBUTORS, ET AL. and COTTON STATES, INC., ET AL., *Petitioners*,

versus

FEDERAL TRADE COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Trade Commission.

Before Jones and Brown, Circuit Judges, and Carswell, District Judge.

Judgment

This cause came on to be heard on the petition of Mid-South Distributors, and others, and Cotton States, Inc., and others, for review of an order of the Federal Trade Commission issued on January 24, 1959, in Docket Nos. 5766 and 5767, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, affirmed.

February 23, 1961

Issued: Apr 3 1961

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:
John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

In the Matter of

Docket No. 5767

D & N Auto Parts Company, Inc., a corporation, et al.

and

Docket No. 5766

Borden-Aicklen Auto Supply Co., Inc., a corporation, et al.

Opinion of the Commission

By Kern, Commissioner:

The complaints in these cases charge the respondents, respectively named therein, with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act.[1] The respondents (except for certain individual respondents against whom the complaints were dismissed) have appealed from the initial decision of the hearing examiner covering both cases which holds that they have violated Section 2(f) and which contains an order to cease and desist the practices found to be unlawful.

These are "group buying" cases. The respondents in each include jobbers for automotive parts, accessories and supplies and a membership corporation. In Docket

[1] These cases have been tried concurrently and under an agreement of all the parties the two have been considered as one case.

No. 5766, the membership corporation is Mid-South Distributors, Memphis, Tennessee; in Docket No. 5767, Cotton States, Incorporated, Andalusia, Alabama. These corporate groups were organized and have been maintained for the apparent purpose of inducing and receiving lower prices on automotive products than would otherwise be obtainable by most of the member jobbers acting individually. Automotive suppliers such as Standard Motor Products, Inc., and Moog Industries, Inc., and others, sold their lines of products to the respondent jobbers and granted them volume rebates based on the aggregate purchases of all the group members. In many, if not in all instances, the volume rebates were made pursuant to a system or plan which involved a sliding scale of discounts based upon the volume purchased in the preceding year.

The main issue on this appeal, it appears, is whether counsel in support of the complaint has met the burden of proof required by Section 2(f) as interpreted by the Supreme Court of the United States in *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61 (1953). The subsection reads as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

There is no question that respondent jobbers have been granted lower prices than some of their jobber competitors on goods of like grade and quality. This results from the discounts ranging up to 20% given by the various suppliers based on the aggregate purchases of all members of each group. The record shows that various competing jobbers did not purchase individually in sufficient volume to receive comparable discounts. There is likewise evidence of keen competition, small profit margins and other factors sufficient to justify a conclusion that the discounts may

result in substantial injury to competition. It is also clear that respondents knew all such factors.

The *Automatic Canteen* case, *supra*, holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of their probable competitive effect. In other words, under the "balance of convenience" rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such evidence, under the Court's opinion, must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless induced or received the discriminatory prices. Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear.

In this case, the record clearly shows that the buying groups were mere bookkeeping devices. There was nothing in their manner of operation which could possibly save a seller any significant amounts. The method of purchase was substantially the same and deliveries were made in the same manner and in substantially the same quantities as if each jobber member had been operating individually rather than as a group member. About the only saving a seller could expect would result from the fact that only one billing need be made instead of several separate billings. *Cf. C. E. Nichoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (1957). It is reasonable to conclude that where price differences are as great as those here shown, ranging up to 20%, any savings such as that on billing costs could not possibly justify the price discriminations.

Respondents obviously had knowledge of this fact. They knew that the jobber members generally would not be entitled to the higher discounts based on their individual purchases. They knew, or should have known, in addition, in view of their purchasing in substantially the same volumes and receiving shipments in the same manner as other jobbers, that any differences in the method of purchasing could not give rise to sufficient savings in cost to justify the price differentials.

Moreover, the price differences shown herein have their source in a rebate system based, not on quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a group made in the preceding year. Under such a system the prices necessarily bear relation to factors other than actual costs of production, sale or delivery, and the inevitable result is systematic price discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (1956). Under such circumstances respondents are charged with the knowledge that the lower prices they received could not be cost justified.

If under the *Automatic Canteen* decision counsel in support of the complaint has the additional burden of producing evidence tending to show that respondent jobbers likewise knew or should have known that the "defenses" of fluctuating market conditions and bona fide attempts to meet lower competitive prices were not available to the sellers, the record is equally persuasive that this burden also has been met.

The last proviso of Section 2(a) exempts from the Act price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned. The substance of the proviso appears to be that a defense may be made out in occasional and temporary situations such as those set forth including imminent deterioration of perishable goods and

obsolescence of seasonable goods. In view of this, respondents would have no reason to believe that the volume rebates they received based on aggregate annual purchases and continued from year to year could possibly have any relation to the aforesaid proviso.

The respondents also knew, or should have known, that the various sellers could not have defended the price discriminations on the basis of the proviso contained in Section 2(b). The respondents knew that the defense of cost justification was unavailable to the sellers for the reasons stated in preceding paragraphs, and for the same reasons knew that such a defense would not be available to any competing sellers granting preferential prices on the same basis. Knowing, therefore, of the illegality of the pricing systems involved, the respondents knew that the sellers could not defend such prices on the basis of meeting in good faith the equally low prices of competitors for the reason that the prices so met would not be lawful prices.

In the *Automatic Canteen* case, the court in a note stated as follows:

> "Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller." (346 U.S. 61, note, 23 at p. 79)

Therefore, while it has been shown sufficiently that respondents knew that the "defenses" of fluctuating market conditions and the meeting of lower competitive prices were not available to the sellers, it appears in the circumstances that counsel in support of the complaint does not have the burden of making such a showing. It seems to be quite clear that the court was referring to situations such as exist herein where the buyers would more readily

have such evidence and would have the burden of coming forward with it.

Respondents further contend on this appeal that Mid-South Distributors and Cotton States, Incorporated, are cooperative associations, and, therefore, not prohibited from returning to their members the net earnings or surplus resulting from their trading operations, in proportion to purchases of the members of the association, citing Section 4 of the Robinson-Patman Act (49 Stat. 1528). It is our opinion that the reasoning of the court in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399-400 (1940), on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions.

Respondents also argue that the respondent jobber companies should not be ordered to cease and desist in their individual capacities the practices held illegal and request that the paragraphs in the order to this effect be stricken. The contention is that these respondent companies are charged with violating Section 2(f), by acting through Cotton States, Incorporated, and Mid-South Distributors, and that it is unfair to issue an order against them relative to their activities as individuals. It is sufficiently clear, we believe, that these proceedings have included the respondent jobbers as individual concerns and that this type of order is necessary to bring an end to the unlawful practices. The Commission, of course, is not limited to prohibiting the illegal practice in the precise form in which it was found to have existed in the past. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondents' appeal is denied. Accordingly, the findings, conclusions and order contained in the initial decision are adopted as those of the Commission.

February 24, 1959

APPENDIX D

Representative Testimony With respect to Petitioners' Knowledge of Cost Justification

Witness Taylor:

Q. I first asked you, does Cotton States perform functions which are an aid to the manufacturer?

A. Yes.

Q. Will you name some of them?

A. Quite often the manufacturer approaches me as a head of the group in the interest of getting his line into the businesses of the individual members. We take the information on the line, the selling points of the line, quality of the merchandise, and all of that, and we take it up with our members by bulletins, by telephone calls, by personal conversations, and make presentations of the line in the meeting, produced samples, furnished by the manufacturers, so the members can all at one time see the line and discuss it pro and con as to the quality of the line and to the sales possibility of that line. We hand out catalog information, advertising material and sales promotion material. We guarantee that manufacturer in case we take the line, we guarantee the payment of all members. We bill it to one place. We assume the responsibility of the payment. The manufacturer only has to keep records on one account, and that is Cotton States, Incorporated. That cuts down on his bookkeeping expense. He has to handle one account instead of 17, 18, and we guarantee his money. We pay it. It cuts down on his credit loss and on his chance of credit loss. There are many other things we do in the way of promoting the sale of his line to our members.

Q. I believe you said, didn't you, that you allow top executives to come to meet with all of you at once, and, therefore, perform a function for him which keeps him from having to go around and see each one; I believe you said that?

A. Yes, but they don't all do that. We do it both ways. In other words, we give them an opportunity to come before us, and if they can't get there, sometimes we present the line. We do it both ways.[25]

Q. Do you perform a function of advertising for their benefit among yourselves?

A. Yes.

Q. What about obsolescence exchange?

A. We do. In other words, we swap our obsolescence off between each member.

Q. How does that benefit the manufacturer?

A. Well, quite often maybe an item won't sell in Squeedunk, Andalusia, or Alabama, or somewhere like that, or sell good on the Coast or it would sell good in North Carolina or it would sell in Birmingham. Maybe they would have an outlet for that. Well, we exchange lists on items that are slow-moving rather than first ask the manufacturer to help us with it. We try to help ourselves first and, therefore, relieve him of that responsibility and expense.

Q. Is that substantial, is that a substantial saving to the manufacturer?

* * *

A. I can't answer it as to the dollars and cents amount but the manufacturer thinks it is a substantial saving because it keeps him from having to put a man into each one of those places trying to peddle out that place, help a man get it out of there, the same service they give to all other accounts.

Q. In other words, where you don't do it for them among yourselves, they send a man from their factory to an individual and pay that man to go down there and do it and so you do it for him or take it up, one?

A. That is right.

Q. Do you warehouse anything?

A. Yes.

Q. And is that a savings to the manufacturer?

A. Yes. We warehouse for each other, in exchange. We give each other the privilege of picking up from each member, other than the fact that we carry some lines in our warehouse.

• • •

Q. Mr. Taylor, he asked you about Moog Industries. To go back to another line of questioning that we left for a moment, can you recall whether or not any authorized representative of Moog Industries has ever represented to Cotton States and its members at a meeting that the prices they sold you at were justified to them in savings in manufacturing and selling?

A. Oh, yes.

• • •

Q. All right. Let me ask y u about Niehoff. Was anything similar to that done by a representative of Niehoff at the meetings of Cotton States?

A. Yes.

Q. Who?

A. I believe that boy's name is Ray Rickett.

Q. He was authorized representative?

A. Yes.

Q. What in substance did he say?

A. Similar statement, that they needed more distribution in this territory and had been unable to get it; that they believe that through our promotion, concerted effort that we could give them what they were looking strictly for sales, and that instead of them running around all over the country and doing what was commonly done at that time, spending $35 to shake hands with a man, that they could come before us in one group and get the story over and get started in business.

Q. What about Whitaker? You mentioned them.

A. Yes.

Q. Will you tell what that was and who it was, if you recall?

A. It was a similar statement, but I don't remember the name of that representative at the moment.

Q. Was he an authorized representative?

A. Oh, yes.

Q. All right. What did he say in substance?

A. He said that they were one of the pioneers of the business, capable business and after market and that they were looking for business through wholesalers and that they felt like that we could do the job for them; that the thing they wanted was more volume of business, more sales and more outlets. They wanted distribution in the territory that we covered and they felt like that we could give it to them.

Q. With reference to Standard Motor Products, Incorporated, does Cotton States buy from them?

A. We do at this time.

Q. What year was that, 1949 and '50, do you recall?

A. I think so. You see, we originally were buying a line known as Hygrade Products and they sold out to Standard Motor Products and we continued to buy the items that we had been buying but we then were buying from the Hygrade Products Division of Standard Motor Products.

Q. Was that very much?

A. Not a great deal.

Q. Did an authorized representative of Standard Motor Products or Hygrade, the one you originally started with, did an authorized representative of Hygrade make similar representations to you that Moog and Niehoff and Whitaker did?

A. He did at that time. The Hygrade line was a good line. The items that they sold then were much better than they do today. They were selling repair kits for fuel pumps and things of that nature, speedometer cables.

Q. They did make similar representations to you?

A. That is right.

Q. What about NAMSCO?

A. Is that National?

Q. That is the one that this fellow Anderson—National Wheel.

A. Oh, yes, yes.

Q. That is the one Mr. Joe Anderson was the head of?

A. Yes, that is my recollection.

Q. And they made similar representations to you?

A. Yes.

• • •

Q. I am asking you now in your opinion whether you believed the price spread that was offered to Taylor Auto Parts in buying from Moog through the Cotton States could be cost-justified on the part of Moog.

• • •

A. Certainly I believe it was cost-justified.

Q. You believe it was?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. May I ask you this, if your opinion wouldn't change if I told you that in the hearing yesterday that they put on a certified public accountant who I had examine the records of Moog and upon cross-examining and asking him if there was any possibility that Moog could cost-justify to any group merchandise, sales, cost-buying organizations his answer was no. Would that cause you to change your opinion in any way?

A. It wouldn't cause me to change my opinion, what the man told me. I told you in the beginning I hadn't seen the records. I don't know what it cost them to do business and I doubt if any auditor knows anything about merchandising. They don't know what it costs to get out and beat the bushes and sell that stuff.

Q. In other words, based on what I told you the testimony of the certified public accountant was, you still hold to your opinion that Moog Industries could cost-justify their sales to the group-buying organization, particularly the Cotton States Group?

A. Yes.

(R. 850-853, 859, 860-862, 877-878)

Witness Griener:

Q. How does the manufacturer benefit, if he does benefit from Cotton States?

A. He benefits in many ways. One of the most important ways I think he benefits is the fact that I don't believe any one jobber who is sitting down there in Podunk Town can get all these merchandising ideas and put them into effect sitting there by himself. Now I think the manufacturer benefits because we actually sit in these meetings and try to find out every possibly [sic] way we can to move his merchandise, to sell it, to get out on the market, and when we are up there exchanging those ideas, I think the manufacturer likes it. They just keep coming back all the time to sell us, to move their merchandise and you can look at their financial statements and they are making money, so they must like the way we are doing it.

Q. Then it is your testimony that Cotton States performs functions in connection with this merchandise that they buy which benefits the manufacturer and results in a savings to him in the cost of merchandising and selling his products?

A. Yes, we do, by other ways besides merchandising. I can give you a concrete example.

Q. Do, please.

A. When I run out say, for instance, I run out of a battery charger. Now, you know if I am sitting down there by myself I can't ring that fellow up down the street and say, "Joe, lend me a battery charger," but I can pick up the phone and call any one of our associates and, by swapping off that merchandise like that, I have made the sale where that manufacturer might have lost that sale.

Q. Have [manufacturers] led you to believe through their words and their actions that any discounts that were

given to Cotton States were justified to them in cost savings and manufacturing and selling?

A. Definitely.

Q. And did you believe it?

A. Yes, sir.

Q. Has there been anything that would lead you to believe otherwise?

A. Not a thing.

(R. 973-74, 977.)

See also testimony of Robinson (R. 246-48); Gates (R. 254, 953-63); Barbee (R. 279-280); Taylor [R. 763-69, 880-909 (listing 90 sellers who informed petitioners that their prices were cost-justified)]; Shipp (R. 926, 932, 941); Cotton (R. 996-98).

Witness Anderson:

A. Well, the advantage of doing that [selling groups] was self-evident, in our opinion, because we automatically acquired a lot of customers who were members of the Cotton States and we were assured of our money promptly; and, of course, the handling of that phase of the business became a lot more simple than selling to each individual, as it were, as there were in Cotton States.

Q. And was the general understanding [that prices were cost-justified] conveyed back and forth between you and the purchasers in general terms that it was so? I am not asking you for the terms of the accounting section; I know you can't recall them.

A. I would certainly say that was the train of thought as far as I was concerned.

(R. 719.)

Witness Goetz:

Q. Through this group your officer level can have one man attend once a year rather than having to send them around to all of the individual members; he can attend a group meeting and that results in a great service to you?

A. That is usually what is done and it does result in great savings to us.

Q. Not only money for his expenses, etc., but it is also a great saving in the time that the office is able to devote to other work for your company?

A. That is right.

(R. 725-726.)

(Goetz also testified that he considered Moog's prices justified in savings through advertising, commission, time saved by the officers of his corporation, cost of introducing new products "and such things as that generally" (R. 731)).

Witness Bushyhead:

Q. You stated that you considered the prices in the discounts and rebates that Moog gave to these respondents justified in cost savings. Would you state for the record some of the ways these respondents, Cotton States and Mid-South aid Moog and some of the savings it affords them?

A. Well, I think probably, as much as anything, in dollars and cents standpoint, would be the travel end of it. If you are talking about anywhere from ten to fifty customers, I don't think there is any question there is considerable saving in the fact you can reach them all at one time rather than have to go to each particular store and put your story over to them and tell them individually the same things you could tell them together. We work with the group manager. For example, in many cases he would travel with one of our men to help our man actually put the Moog story over. He's supposed to learn it, too, almost like we are. He assists us in making sales.

Of course, we don't have the credit problems. That is another important thing as far as we are concerned. Our customer, who would be Cotton States or Mid-South, are the ones that pays us and carries the credit and that can become a considerable cost, particularly if somebody doesn't pay you or refuses to pay you.

We disseminate information through them through bulletins,.through personal contacts and meeting them all together.

It would be hard for me to put an actual dollar value on it, but I think that the exchange of ideas at a meeting, there is no telling how much that would be worth to us where one jobber doesn't do so well on our line and another jobber does a very good job on our line, and the fact they can get together and talk about those things sometimes has a tremendous influence, in my opinion, on the other man buying the line from them. They exchange obsolescence in many cases.

Obsolescence is a big problem of any jobber. It is common knowledge. And through their association together, I think many of our obsolescence problems are minimized through exchange of obsolescence, and sometimes fast moving merchandise which they have too much of. Those are the types of things that I feel have considerable cost justification to them.

(R. 1126-1127.)

SUPREME COURT, U. S.
MOTION FILED
Office-Supreme Court, U.S.
FILED
JUN 20 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE SOUTHWEST AUTOMOTIVE DISTRIBUTORS, INC., ET AL.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 997

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners*,

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Southwest Automotive Distributors, Inc., and its members hereby respectfully move for leave to file a brief amici curiae in this case. The consent of the attorney for the petitioners has been obtained. The consent of the Solicitor General was requested, but refused. (See Appendix, p. 1a.)

Southwest Automotive Distributors, Inc. is a cooperative association organized, existing, and doing business under the laws of California. Members of the cooperative are independent automotive wholesalers (jobbers) engaged in the resale of automotive parts and supplies to the automotive retail trade in competition with the entire range of jobber distributors in the automotive replacement market, including dealer organizations of automobile manufacturers, oil and rubber company outlets, chain outlets, and other independent distributors. In its organization and method of doing business, the cooperative is functionally similar to Mid-South Distributors, Inc., and Cotton States, Inc., the petitioner cooperative associations herein.

Amici are respondents in a Federal Trade Commission action, Docket No. 6890, a proceeding analogous to the instant proceeding, instituted by complaint of the Federal Trade Commission. In that proceeding, unable to sustain

the burden of extended litigation, *amici* entered into a consent order agreement to cease and desist, effective March 27, 1959. That agreement expressly provided that it was entered for settlement purposes only and did not constitute an admission by respondents therein (*amici* here) that they had violated the law as alleged in the complaint. *Amici* are similarly situated with petitioners here and subject to the same competitive inhibitions, should the decision under review be affirmed. However, should the Commission order here be set aside by this Court, *amici* would then be in a position to invoke Rule 3.27(b) of the Commission's Rules of Practice for Adjudicative Proceedings, which establishes a procedure for modifying or setting aside pre-existing orders to cease and desist on the basis of changed circumstances of fact or law.

The Solicitor General, attorney for respondent, refused his consent to the filing of a brief amici curiae in a letter dated June 5, 1961. (App. p. 1a.) He asserts that Southwest Automotive Distributors, Inc., and its members, by agreeing to the consent order waived whatever rights they might have under Section 4 of the Robinson-Patman Act. This is not correct. The Section 4 exemption is statutory and even if it could be waived, it would be necessary to do so explicitly. Furthermore, the brief *amici curiae* would be submitted to assist this Court in reaching its decision by presenting a question which Southwest and its members believe should be before the Court, and which is not adequately presented by petitioners.

The impact of the Court of Appeals decision must be viewed against the background of the industry, the automotive parts replacement business. The ultimate consumer, the automobile owner, obtains replacement parts from a retail outlet. Generally, these outlets find it impossible to stock all parts for all cars. The replacement parts dealer must rely on his suppliers. Historically this was the independent jobber.

In recent years this traditional distribution pattern has been joined, and in major part overrun, by larger integrated competitors such as the auto manufacturers, oil and rubber companies, and chain outlets. Today only the small

independent repair shop relies primarily on the independent jobber, although 20 to 30 years ago this was equally true of car dealers, service stations, and chain stores. As auto manufacturers and oil and rubber companies integrated forward into retail functions they gradually confined the channels of distribution to their own organizations, depriving independent jobbers of large and hitherto openly accessible markets.

Independent jobbers supplying a limited number of dealer outlets found that the mass purchasing power of their integrated competitors enabled those competitors to purchase at prices unavailable to jobbers and to coerce price concessions from suppliers. This was a great competitive inequity to the jobbers who could not obtain the same low prices. In defense, cooperative associations such as petitioners and *amici* were created so that competition might be maintained.

QUESTION NOT ADEQUATELY PRESENTED

The Court Below Erred in Failing to Hold That the Charged Cooperative Practices Were Exempt Under Section 4 of the Robinson-Patman Act

While petitioners have fully pointed up the failure of the Court of Appeals to conform to the intent of Congress and to observe the proof standards of "knowledge" set forth in *Automatic Canteen*, they have mentioned but failed to develop the equally important issue involving Section 4 of the Robinson-Patman Act. The Court of Appeals summarily adopted the final decision of the Commission which superficially dismissed petitioner's contention that the practices charged in the complaint were exempt under Section 4 of the Robinson-Patman Act which provides that:

> "Nothing in section 13-13b, and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." (15 U.S.C. 13b).

The Commission held that:

> "[T]he reasoning of the Court in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399-400 (1940), on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions." (R. 126)

The Court of Appeals agreed, stating:

> "The § 4 exemption has no such purpose. It recognizes cooperatives as valid organizations. But it does not turn the entity loose to acquire on behalf of its members, through the guise of group purchasing, price differentials or other preferences to which each would not otherwise be entitled."

The decision of the Commission as affirmed by the Court of Appeals below is a misapplication of the *Quality Bakers* doctrine and wholly avoids the scope of the Section 4 exemption. At no point have petitioners contended that Section 4 authorizes a cooperative association to violate Subsection 2(f), of the Clayton Act, as amended, [15 U.S.C. § 13(f)].

There is no claim here that the cooperative received an unlawful price discrimination: The gravamen of the Commission's complaint was that the members of the cooperative, through the receipt of patronage dividends, obtained an unlawful price discrimination—and this practice is precisely what is permitted under Section 4 of the Act. The right to participate, through shared savings, in the economies of cooperative operations is the bedrock rationale for the formation of cooperatives, and it was this right which Congress guaranteed in Section 4.

The economic stimulus to a cooperative form of business is the defensive need of small business units to enter into collective operations in order to achieve the economies and price advantages of joint operations. In enacting Section 4, Congress explicitly codified its intent to permit such activities without subjecting these enterprises to antitrust

liability in the event lower prices were received by members through the cooperative than otherwise might have been received outside the cooperative. The instant decision, superficially analogizing the practices herein to those condemned in the *Quality Bakers* case, confounds this legislative intent and constricts the core of lawful cooperative business activity.

CONCLUSION

Petitioners do not adequately develop the vital question with respect to the cooperative exemption under the Act. The sole reference to this exemption is an element of knowledge under the basic charge. But scope and limitation of the cooperative exemption is of primary significance not only to amici (and petitioner) but to small businessmen throughout our economy who are joined together in bona fide cooperative ventures. In a real sense the Commission and Court of Appeals have read the cooperative exemption out of the statute. No such intention can be attributed to the Congress. This Court should now interpose its authority to correct this fundamental error and for the first time to give definition to this exemption.

The interest of amici is clear and vital. The filing of a brief amici curiae would be of value to the Court in reaching a judgment on the critical issues presented in this petition. We ask that this motion for leave to file a brief amici curiae be granted.

Respectfully submitted,

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APPENDIX

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

102-995

June 5, 1961

Peyton Ford, Esq.
Ford, Larson, Greene and Horan
1000 Connecticut Avenue
Washington 6, D. C.

Re: Mid-South Distributors, et al. v. Federal Trade Commission—U.S. Sup. Ct., Oct. T., 1960, No. 997

Dear Mr. Ford:

You have requested, on behalf of Southwest Automotive Distributors, Inc., permission to file a brief *amicus curiae* in support of the petition for certiorari in this case. In that connection you submitted to me a memorandum indicating that the consent order entered by the Federal Trade Commission against your client raises issues which are the same as those presented in the petition in No. 997.

I am informed by the Federal Trade Commission that Southwest Automotive Distributors, Inc., and its members stipulated in their agreement for the consent order that they waived "all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement." In view of this stipulation, I do not believe that it would be appropriate for me to grant consent to the filing of a brief on behalf of Southwest Automotive Distributors, Inc. In challenging the order entered against the petitioners in No. 997, Southwest Automotive Distributors, Inc., would in effect be challenging the validity of the cease and desist order entered against it.

Sincerely yours,

ARCHIBALD COX
Archibald Cox
Solicitor General

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FILED
JUL 21 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners*

v.

FEDERAL TRADE COMMISSION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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July 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners*

v.

FEDERAL TRADE COMMISSION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY TO BRIEF IN OPPOSITION

The brief in opposition filed by the Federal Trade Commission is unresponsive to the essential contentions of petitioners. By stating these contentions incorrectly, the Commission seeks to convert the legal questions presented in the petition into factual issues unsuitable for review by this Court.

A brief reply, we believe, is in order.

1. The brief in opposition obscures the issues presented by the petition by restating the question presented as one involving whether the finding of a violation of Section 2(f) by the Commission was "supported by the evidence" (Br. Opp. p. 2). The Com-

mission then asserts that this "type" of question is "primarily factual" (Br. Opp. p. 6). If this were the question presented, we would agree that there would be little occasion for review. This Court has repeatedly stated that the "substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. * * *' " *Federal Trade Commission* v. *Standard Oil Company*, 355 U.S. 396, 401 (1958).

The principal issues raised by this petition involve the meaning of the requirement of "knowledge" under Section 2(f). This is a question of law. In *Automatic Canteen* v. *Federal Trade Commission*, 346 U.S. 61 (1953), this Court in an extensive opinion detailed the proof standards which the Commission must establish in the trial of a charge under Section 2(f).[1] Petitioners' position is that these legal standards have been grossly misapprehended and misapplied by the Court of Appeals and, before that, by the Federal Trade Commission. Review is sought here to correct these legal errors. As recognized in *Automatic Canteen* itself, this Court is "charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions . . ." *Id.* at 81.

---

[1] In view of this single, comprehensive authority, it is astonishing that nowhere in the decision of the Hearing Examiner is there a reference to *Automatic Canteen*, nor, even by indirection, an application of its requirements. His decision reads as if *Automatic Canteen* had never been decided. On appeal, this omission was brought to the Commission's attention by petitioners. The Commission's decision, while acknowledging *Automatic Canteen*, ignores its directives. Affirming, the Court of Appeals has approved what, in effect, was the Commission's position rejected in *Automatic Canteen*.

2. *Automatic Canteen* holds that to establish a violation of Section 2(f) the Commission must prove that the buyer *knew* that the lower price received would have had the effect of creating a likelihood of injury to competition. The court below was correct insofar as it ruled that there must be proof that the price differentials created a reasonable likelihood of injury to competitors (See Pet. 7a). But in a section 2(f) proceeding, the Commission must *further* prove that the buyer had *knowledge* of the likelihood of this effect on competition. Thus, the court below committed plain error when it concluded that "So far as the specific element of discriminatory injury is concerned, the Government's Section 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors" (Pet. 8a). In so deciding, the court completely left out the critical knowledge requirement. But as this Court held in *Automatic Canteen*, "the inquiry must be into the buyer's knowledge of the illegality." *Automatic Canteen* v. *Federal Trade Commission*, *supra*, at 73.

The court below misconceived this Court's interpretation of the proof standards under § 2(f). It failed to comprehend that the fact of illegality and the fact of the buyer's knowledge of the illegality are two separate ingredients of the buyer's offense.[2] It assumed,

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[2] The Attorney General's Report states the two-step proof procedure as follows:

> "To transgress Section 2(f) a buyer not only must obtain an unlawful concession but also must be reasonably aware of its illegality. Conversely, exoneration followed from either a successful showing that the challenged price quotation was not in fact illegal, *or* that the buyer had no reason to know otherwise." (Attorney General's National Committee to Study the Antitrust Laws, p. 194 (1955), citing this Court's decision in *Automatic Canteen*).

erroneously, that once the Commission establishes that the price discrimination had the proscribed anti-competitive effect, then the buyer must have known of this effect at the time of the receipt of the lower price. Needless to say, even today after 25 years of Robinson-Patman enforcement, sellers market at different prices without knowing whether or not they are violating the law. The problem of knowing competitive effect is even more difficult for buyers.

3. *Automatic Canteen* holds that the Commission, as part of its case under § 2(f), must also prove that the buyer *knew* that the seller's price differentials were not justified by any of the defenses provided by the Act. Here the record evidence shows that the petitioners had reasonable grounds to believe that their sellers were protected by the cost justification defense, the good faith meeting of competition defense, and the co-operative exemption under § 4.

On cost justification, the court below made a finding of buyer's knowledge in the face of undisputed record evidence of actual cost savings resulting from the larger quantity purchases and evidence that sellers assured petitioners of the cost justification for the lower prices.[3] All this evidence was ignored by the Court of Appeals. In so doing, the court plainly misapplied the standards of *Automatic Canteen.*

---

[3] In *Automatic Canteen*, this Court noted: "We need not in this case consider the weight that can be attached to affirmative statements by the seller to the buyer that a price was or was not cost-justified, since there were no such statements in this case." 346 U.S. 80, n. 24. The issue is directly raised in this case, however. There is not only evidence of such statements by the sellers to petitioners, but this evidence was wholly ignored below.

On the § 2(b) defense, the court below rejected evidence of the petitioners' knowledge relating to their sellers' good faith meeting of competition defense on the ground that the petitioners bargained for the lower prices. On this point, the court specifically said:

> A buyer earnestly negotiating with a Supplier to obtain from such Supplier the benefit of that Supplier's discount tables already in effect can certainly not urge that he was entitled to assume that the Supplier was extending such price differentials as a means of meeting competition with other Suppliers. (Pet. 13a)

This very argument was rejected by this Court in *Automatic Canteen*. There the Court said.

> The Commission argues that Congress was attempting to reach buyers who through their own activities obtain a special price and that 'knowingly to induce or receive' can be read as charging such buyers with responsibility for what ever unlawful prices result. But that argument would comprehend any buyer who engages in bargaining over price. 346 U.S. at 71-2.

This Court rejected the Commission's arguments as "unsatisfying", pointing out that to so read the statute would put "the buyer at his peril whenever he engages in price bargaining." Id. at 73. Yet, despite this definitive ruling, the Court of Appeals accepted the old Commission position.[4]

---

[4] Regarding the question of whether petitioners knew the prices they received were not exempted by the provisions of Section 4, suffice it to say here that this issue was wholly ignored by the Court of Appeals and the Commission. The scope and meaning of Section 4, including its application to § 2(f), are presented to this Court as matters of first impression.

4. The determination of these legal questions is obviously of great importance to purchasers, particularly small ones, throughout our economy. All buyers naturally aim to secure the lowest possible prices. How far buyers will go in bargaining for lower prices will depend greatly on the manner in which the Federal Trade Commission administers and enforces § 2(f). The basic question here is whether buyers' liability under that section will be governed by the standards of *Automatic Canteen* or the "new" criteria promulgated by the Court of Appeals in this proceeding. If this latter interpretation prevails, so that knowledge of price differentials alone is sufficient to create buyer liability, then there will be no room left for "that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." *Automatic Canteen* v. *Federal Trade Commission, supra.* at 74.

5. Lastly, it should be noted that contrary to the Commission's contention (Br. Opp. pp. 5-6), the denial of certiorari in *American Motor Specialties Co.* v. *Federal Trade Commission*, 278 F. 2d 225 (2nd Cir., 1960), *cert. denied* 364 U.S. 884, is not dispositive of this petition. It should be unnecessary to reiterate that a denial of a petition for a writ of certiorari "imports no expression of opinion upon the merits of the case, as the bar has been told many times" *United States* v. *Carver*, 260 U.S. 482, 490 (1923). In any event, while the petition in *American Motor Specialties* raised a question of proof standards under § 2(f), this was merely one of the five questions presented; the other questions related to such disparate issues as the failure to allege interstate commerce, the conflict with New York's Cooperative Corporations law, and the

admissibility of documentary evidence. Here, different substantive issues are presented involving the basic legal standards to be applied in adjudicating buyer liability under § 2(f).

The basic holding of the court below is of major significance in the administration of the Robinson-Patman Act. By virtually reading out of § 2(f) the requirement of knowledge, the decision openly conflicts with the opinion of this Court in *Automatic Canteen* and runs counter to the objectives sought by Congress in enacting the law. The practical result will be to inhibit, if not eliminate, effective price bargaining by buyers with sellers. We submit that the questions presented are serious and of widespread public importance and, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 154.

In the Supreme Court of the United States

October Term, 1961

[redacted] ET AL., COTTON STATES,
[redacted], PETITIONERS

[redacted] COMMISSION

PETITION AND BRIEF OF PETITIONERS TO THE
[redacted] COURT OF APPEALS FOR THE
[redacted] CIRCUIT

[redacted] COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-14a) is reported at 287 F. 2d 512.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1961 (Pet. 15a). The petition for a writ of certiorari was filed on May 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the Federal Trade Commission that petitioners had knowingly received unlawful discriminatory prices from their suppliers in violation of Section 2(f) of the Clayton Act was supported by the evidence.

STATUTES INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; * * *
>
> (b) * * * *ovided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *.
>
> * * * *

> (f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 4 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13b, provides:

> Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

STATEMENT

Petitioners Mid-South Distributors and Cotton States, Inc., act as buying agents for the 23 jobber petitioners who are engaged in selling automotive parts and supplies to wholesalers. Orders are sent in by member jobbers to the manufacturer on a Cotton States or Mid-South order form and the goods are shipped directly to the jobber by the manufacturer (R. 135-136). One copy of the order is forwarded by the jobber to the office of the cooperative (R. 139) which maintains a small staff and minimal warehousing facilities. Settlement of the aggregate purchases is made monthly by the cooperative (R. 149), which then bills each member jobber for its individual purchases (R. 147). The combined purchases in the name of the cooperative enable it to

qualify for maximum quantity discounts offered by the manufacturers. These discounts are based on annual purchases and generally reach a maximum of 20 percent for purchases of large amounts of goods. (See, *e.g.*, Comm. Exs. 10 and 52.) When the cooperatives receive these rebates, they are divided periodically among the member jobbers in proportion to their contribution to the total purchases which enabled the cooperative to qualify for the discount (R. 150).

The Commission on May 1, 1950, filed a complaint charging that the respondents in receiving these quantity discounts had knowingly accepted discriminatory prices prohibited by Section 2 of the Clayton Act, 15 U.S.C. 13 (R. 54-75). After full hearing, the examiner issued an Initial Decision finding the charges against the petitioners to have been sustained in every particular and ordering the jobber petitioners to cease and desist from securing, or utilizing the petitioner buying organizations as a means of securing discriminatory rebates from the parts manufacturers (R. 90-119). On appeal, the Commission adopted the examiner's findings, conclusions and order as its own (R. 119-120). Its opinion (R. 120-127; Pet. 16a-21a) concludes that the buying groups were merely bookkeeping devices and that there was nothing in the manner of operation which could result in any savings to the seller which could conceivably justify the large price discrimination between the members of the buying groups and other independent jobbers purchasing in virtually the same manner and in similar quantities. The inevitable result, the Com-

mission held, was the receipt of systematic price discriminations (Pet. 19a). The Commission further held that counsel in support of the complaint had sustained the evidentiary burden imposed by the case of *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, of showing that the petitioners knew or should have known that the seller's conduct was an unlawful price discrimination and not within one of the exculpatory provisions of Section 2 of the Clayton Act (Pet. 20a). The court of appeals affirmed (Pet. 1a-14a).

ARGUMENT

It is established that the giving of quantity discounts by automotive parts manufacturers to cooperative buying organizations of the type involved here violates Section 2(a) of the Clayton Act, 15 U.S.C. 13(a). See, *e.g.*, *Standard Motor Products* v. *Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), certiorari denied, 361 U.S. 826; *P. & D. Mfg. Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (C.A. 7), certiorari denied, 355 U.S. 884; *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (C.A. 8), affirmed, 355 U.S. 411. This is the second case to have reached this Court involving the converse situation—the liability under Section 2(f) of the Clayton Act of the cooperative buying organizations and their constituent members for knowingly receiving the discriminatory prices. See *American Motor Specialties Co.* v. *Federal Trade Commission*, 278 F. 2d 225 (C.A. 2), certiorari denied, 364 U.S. 884. The present petition raises only the question whether the

Commission met the burden of demonstrating the knowledge necessary to support a finding of violation of Section 2(f) of the Clayton Act. Cf. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. This type of question, which the Court previously declined to review in *American Motor Specialties*, *supra*, is primarily factual and does not warrant certiorari. Nor is there any conflict between the circuits as to the standards upon which questions of this type should be adjudicated by the Commission.

1. Petitioners argue that the Commission failed to sustain its burden of showing that they were aware that the price discriminations they received would have the requisite adverse effect upon competition. But, as the Commission (R. 101) and the court of appeals (Pet. 7a-8a) both pointed out, petitioners were fully aware that they were securing by their actions a substantial price advantage over competing jobbers purchasing similar quantities of goods from the manufacturers, and that this advantage hurt their competitors and injured their ability to compete on equal terms. Knowledge that a buyer's competitors will be injured by a price discrimination "in itself is sufficient" to support a conclusion that the recipients of the discrimination knew or should have known that it "may" have the requisite adverse effect upon competition since, as this Court has stated, it is "self evident * * * that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially

cheaper than they sell like goods to the competitors of these customers". *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50. See also *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726; *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 62-64.

2. Petitioners' claim that they were not shown to have had knowledge of the lack of cost justification for the rebates is equally lacking in merit. As the court of appeals, in affirming the findings and conclusions of the Commission on this point (R. 101-113), aptly summarized (Pet. 10a-11a):

> [The] volume discount rebates * * * were extended by Suppliers to induce greater purchases and not because the narrow price differential in each minutely graduated price tier represented any real difference or savings in costs. * * * The presentation to Suppliers by the Co-ops in seeking a discount arrangement was primarily one emphasizing volume only. The effort was not to convince a prospective Supplier that through the group purchases of the Co-op, economies would be effected. What was sought, and all that was sought, was parity with others who bought a like quantity. This was quite without regard to whether there were or were not savings.

Petitioners point to evidence that the sellers repeatedly assured them in general terms that the volume discounts could be cost justified. The Commission considered this evidence but found it "must be rejected" (R. 113) in view of petitioners' experience in the highly competitive automobile parts mar-

ket and their knowledge that no difference in the cost of manufacture, sale or delivery was involved as a result of their establishment of the cooperative buying organization (R. 113). The court of appeals, pointing to the fact that the "vague" sellers' statements were "repeated parrot-like for a succession of companies indiscriminately including many who extended no volume discounts and from whom individual jobbers could buy cheaper than through the Co-ops" (Pet. 12a), expressly affirmed the Commission's rejection of this testimony. This is exactly the situation envisioned by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 80-81, n. 24, where it indicated that:

> * * * the Commission may in some circumstances wish to refuse to accept a buyer's claim that he relied on an affidavit or other assurance from the seller that price differentials were cost-justified; the furnishing of such an assurance might, together with other circumstances, indicate a sufficient absence of arm's-length bargaining to raise serious doubts as to the weight the assurance should be given in support of a buyer's claim.

3. Petitioners' other arguments relating to their alleged lack of knowledge of the non-availability of the Section 2(b) "meeting competition" defense, and of the fact they did not come within the statutory exemption for cooperatives set forth in Section 4 of the Robinson-Patman Act, require little discussion. As to the meeting-competition defense, it is enough to state that the cooperatives were not creatures of the manufacturers set up in order to enable the manu-

facturers to compete more effectively among themselves. Rather, the respondent cooperatives were originated by the respondent jobbers as a way of obtaining the maximum advantage from a volume discount system already in effect. The petitioners' contention regarding lack of knowledge of the adequacy of the statutory exemption for cooperatives as a defense is foreclosed by the language of the statute itself. Section 4 of the Robinson-Patman Act exempts only the distribution of profits by a cooperative to its members and does not presume to authorize discriminatory practices forbidden by other sections of the Act solely because they were carried out by a cooperative. *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393 (C.A. 1); *American Motor Specialties Co., Inc.* v. *Federal Trade Commission*, 278 F. 2d 225 (C.A. 2), certiorari denied, 364 U.S. 884. In any event, the burden of showing that a person or practice falls within the exemption provisions of Section 4 is not upon the Commission; the "knowingly" language of Section 2(f) of the Clayton Act, upon which the rule of the *Automatic Canteen* case, *supra*, rests, refers only to the prohibitions of "this section"—*i.e.*, Section 2 of the Clayton Act, as amended, and Section 4 of the Robinson-Patman Act is not part of that "section". Cf. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE, 1961.

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